

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Jan 04, 2012, 11:29 am  
BY RONALD R. CARPENTER  
CLERK

RECEIVED BY E-MAIL

NO. 85382-7

**SUPREME COURT OF THE STATE OF WASHINGTON**

(Court of Appeals No. 40909-7-II)  
(Clark County Superior Court Cause No. 09-2-02453-1)

**DOUGLAS FELLOWS as Personal Representative  
of the Estate of JORDAN GALLINAT**

**Petitioner,**

**vs.**

**DANIEL MOYNIHAN, M.D., KATHLEEN HUTCHINSON, M.D.  
AND SOUTHWEST WASHINGTON MEDICAL CENTER,**

**Respondents.**

**REPLY BRIEF OF PETITIONER FELLOWS**

**John Budlong  
WSBA #12594**

**THE BUDLONG LAW FIRM  
100 Second Avenue South  
Suite 200  
Edmonds, Washington 98020  
(425) 673-1944**

**Lawrence Wobbrock  
WSBA #31412**

**LAWRENCE WOB BROCK  
TRIAL LAWYER, P.C.  
806 SW Broadway Floor 10  
Portland, Oregon 97205-3312  
(503) 228-6600**

**Attorneys for Petitioner Douglas Fellows/Jordan Gallinat**

ORIGINAL

ORIGINAL

## TABLE OF CONTENTS

|      |  |    |
|------|--|----|
| I.   | INTRODUCTION .....   | 1  |
| II.  | ARGUMENT .....   | 2  |
|      | A. A Hospital's Pre-incident Credentialing and Privileging<br>Records For Its Medical Staff Are Non-Privileged,<br>Discoverable, Original Source Documents, Not Records Of<br>Immune Proceedings ..... | 2  |
|      | B. A Hospital's Decision, Records And Reasons For<br>Terminating Or Restricting Medical Staff Privileges Are<br>Non-Privileged and Discoverable Under RCW 4.24.250(1)<br>And RCW 70.41.200(3)(d) ..... | 5  |
|      | C. If Petitioner Prevails On His Discovery Claims, The Trial<br>Court Should Be Directed To Assess CR 37(b)(2)<br>Sanctions Against SWMC .....   | 11 |
| III. | CONCLUSION .....   | 19 |

## TABLE OF AUTHORITIES

### Washington Cases:

|   |                  |
|---|------------------|
| <i>Adcox v. Children's Orthopedic Hospital,</i><br>123 Wn.2d 15, 864 P.2d 921 (1991) .....                | 10               |
| <i>Alderwood Water Dist. v. Pope &amp; Talbot, Inc.,</i><br>62 Wn.2d 319, 382 P.2d (1963) .....           | 9                |
| <i>Anderson v. Breda,</i><br>103 Wn.2d 901, 700 P.2d 737 (1985) .....                                     | 4-7, 10          |
| <i>Burnet v. Spokane Ambulance,</i><br>131 Wn.2d 484, 933 P.2d 1036 (1997) .....                          | 5                |
| <i>Coburn v. Seda,</i><br>101 Wn.2d 270, 677 P.2d 173 (1984) .....  | 1-8, 10          |
| <i>Douglas v. Freeman,</i><br>117 Wn.2d 242, 814 P.2d 1160 (1991) .....                                   | 4, 5             |
| <i>Lowy v. Peacehealth,</i><br>159 Wn. App. 715, 247 P.3d 7 (2011) .....                                  | 2, 4, 5, 7       |
| <i>Magana v. Hyundai Motor America,</i><br>167 Wn.2d 570, 220 P.2d 191 (2010) .....                       | 1, 14, 15, 17-19 |
| <i>Mayer v. Sto Indus., Inc.,</i><br>156 Wn.2d 677, 132 P.3d 115 (2006) .....                             | 17               |
| <i>Ripley v. Lanzer,</i><br>152 Wn. App. 296, 215 P.3d 1020 (2009) .....                                  | 4, 5             |
| <i>Rivers v. Wash. State Conference of Mason Contractors,</i><br>145 Wn.2d 674, 41 P.3d 1175 (2002) ..... | 14               |
| <i>State v. Young,</i><br>125 Wn.2d 688, 888 P.2d 142 (1995) .....  | 9                |

*Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*,  
 122 Wn.2d 299, 858 P.2d 1054 (1993) . . . . . 1, 15, 18, 19

**Washington Statutes and Court Rules:**

|   |               |
|---|---------------|
| RCW 4.24.250(1) . . . . .               | passim        |
| RCW 70.41.200(1)(a), (b), (c) . . . . . | 7             |
| RCW 70.41.200(3) . . . . .              | passim        |
| RCW 70.41.200(3)(c) . . . . .           | 9, 10         |
| RCW 70.41.200(3)(d) . . . . .           | passim        |
| RCW 70.41.230(5) . . . . .              | 12, 13        |
| RCW 70.43.010 . . . . .                 | 3             |
| CR 26(b)(1) . . . . .                   | 4, 8          |
| CR 33 . . . . .                         | 9             |
| CR 34 . . . . .                         | 9             |
| CR 34(a)(1) . . . . .                   | 8             |
| CR 37 . . . . .                         | 19            |
| CR 37(b)(2) . . . . .                   | 1, 11, 19, 20 |
| ER 407 . . . . .                        | 11            |

## I. INTRODUCTION

In *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984), this Court “reject[ed] any common law privilege... that would further constrict access to information” in health care malpractice lawsuits beyond what is provided for in RCW 4.24.250(1), concluding that the “legislative balance... between access to evidence and medical staff candor...is sufficient to assure effective quality review.” Since no health care discovery or evidentiary privilege exists at common law, the issues of statutory construction on this appeal are: (1) whether a hospital’s pre-incident credentialing and privileging records for its medical staff are privileged from discovery under RCW 4.24.250(1) or RCW 70.41.200(3); (2) whether a hospital’s post-incident termination or restriction of a physician’s privileges, including the specific restrictions it imposes and its reasons for the restrictions, are discoverable under RCW 70.41.200(3)(d); and if so, (3) whether defendant SWMC should be assessed CR 37(b)(2) sanctions for wilfully violating the trial court’s May 4 and June 21, 2010 discovery orders and the discovery mandates in *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 585-86, 220 P.2d 191 (2010) and *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 347, 352, 858 P.2d 1054 (1993) by not looking for or producing

its records terminating or restricting defendant Moynihan's hospital privileges and not certifying that those records do not exist.

## **I. ARGUMENT**

### **A. A Hospital's Pre-incident Credentialing and Privileging Records For Its Medical Staff Are Non-Privileged, Discoverable, Original Source Documents, Not Records Of Immune Proceedings.**

A hospital's pre-incident credentialing and privileging records for its medical staff are not privileged from discovery under RCW 4.24.250(1) or RCW 70.41.200(3) because those records contain "information from original sources" ... "generated outside review committee meetings" [that] "would not be shielded merely by its introduction at a review committee meeting." *Coburn, supra* at 277; *Lowy v. Peacehealth*, 159 Wn. App. 715, 247 P.3d 7 (2011) (applying *Coburn's* limitations on the "peer review" privilege in RCW 4.24.250(1) to the "quality improvement" privilege in RCW 70.41.200(3)).

SWMC admits that "the extent of [Jordan Gallinat's] physicians' training and experience in their respective fields (including Dr. Moynihan's training and experience with vacuum extractors prior to September 1996)... can be "determin[ed] *from non-privileged sources.*" *Joint Brief at 25* (emphasis supplied). It also admits that its credentialing and privileging records for Jordan's physicians are relevant evidence. *Joint Brief at 13*. To avoid discovery of these non-privileged, relevant, original source records,

SWMC attempts to convert them into privileged “record[s] of immune proceedings” by making its credentialing committee, which collected and maintained these records, part of its quality improvement/peer review committee. *See Eling Dec.*, CP 549-51. But *Coburn* says this cannot be done because the Legislature did not allow health care providers to convert non-privileged, original source documents into privileged records by this means:

Concern that the statute might be used in this manner [to shield information otherwise available from original sources by introducing it at a review committee meeting] was expressed by Representative Bottiger during debate of the original 1971 enactment of RCW 4.24.250, when he asked: “Can you get the evidence out of the civil malpractice action by setting up a [peer review] committee hearing and filing the reports [of a different type of committee] with them?” A sponsor of the bill replied, “[T]he answer to that question is clearly “no.” House Journal, 42d Legislature (1971) at 876-77.

101 Wn.2d at 277, fn. 3.

RCW 70.43.010 mandates that hospitals “set standards and procedures to be applied by the hospital and its medical staff in considering and acting upon applications for staff membership or professional privileges” without conferring any discovery privilege on performing that statutory duty. Since the original source credentialing and privileging records that SWMC’s credentialing committee is required to collect and maintain pursuant to RCW 70.43.010 are not “record[s] of immune proceedings”, they by default are

non-privileged, discoverable administrative records. *See Anderson v. Breda*, 103 Wn.2d 901, 906, 700 P.2d 737 (1985).

SWMC's suggestion that plaintiff can determine "the extent of [his] physicians' training and experience in their respective fields" from other sources, *Joint Brief at 25*, is not a discovery defense because the hospital's pre-incident credentialing and privileging records are non-privileged, relevant and discoverable under CR 26(b)(1). Further, without SWMC's records, plaintiff cannot determine *SWMC's* knowledge (or ignorance) of his physicians' qualifications, experience or lack thereof, or provide his medical experts with evidence necessary to evaluate *SWMC's* privileging decisions. Thus, SWMC's credentialing and privileging records are essential, as well as non-privileged and relevant, to proving petitioner's corporate negligence claims. *See Douglas v. Freeman*, 117 Wn.2d 242, 814 P.2d 1160 (1991) and *Ripley v. Lanzer*, 152 Wn. App. 296, 215 P.3d 1020 (2009).

SWMC contends that RCW 70.41.200(1)(a)'s requirement that hospitals have a "quality review committee" review in-hospital services "both retrospectively and prospectively" eliminated *Coburn's* distinction between discoverable "prospective review" and privileged retrospective review. *Joint Brief at 14-17*. But this argument wholly misses the point of *Coburn*, *Anderson* and *Lowy* (which respondents fail to discuss), that original source

documents—such as a hospital’s pre-incident credentialing and privileging records for its medical staff—are not privileged under RCW 4.24.250(1) or RCW 70.41.200(3), regardless of whether a hospital review committee reviews them before or after an adverse medical incident.

*Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 497, 933 P.2d 1036 (1997) holds it is an abuse of discretion to deny discovery of a hospital’s non-privileged, pre-incident credentialing records. Since SWMC’s pre-incident credentialing and privileging records are non-privileged under *Coburn*, *Anderson*, and *Lowy*, relevant and necessary under *Douglas* and *Ripley*, and mandatorily discoverable under *Burnet*, the trial court abused its discretion in denying discovery of SWMC’s credentialing and privileging files.

**B. A Hospital’s Decision, Records And Reasons For Terminating Or Restricting Medical Staff Privileges Are Non-Privileged and Discoverable Under RCW 4.24.250(1) And RCW 70.41.200(3)(d).**

The Legislature and this Court have consistently exempted evidence relating to a hospital’s termination or restriction of a physician’s staff privileges from the protection of the health care privilege statutes. RCW 4.24.250(1) says its “peer review” privilege does not apply to “...actions arising out of the recommendations of such [quality review] committees or boards involving the restriction or revocation of the clinical or staff privileges

of a health care provider.” Referring to this privilege exception, this Court in *Anderson* held:

A facial examination of the statute [RCW 4.24.250(1)] reveals that it is not designed to obstruct discovery as to whether a physician’s privileges had been revoked or suspended.

103 Wn.2d at 907. Similarly, the privilege in RCW 70.41.200(3) “...does not preclude:... (d) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions....”

RCW 4.24.250(1), RCW 70.41.200(3)(d) and the *Anderson* decision embody, in a positive rule of law, the Legislature’s judgment and determination that the goal of “careful self-assessment” mentioned in *Coburn*, 101 Wn. 2d at 274, must yield to the public’s right to know, and a malpractice plaintiff’s right to discover, that a hospital has terminated or restricted a physician’s privileges to perform in-hospital medical procedures, “including the specific restrictions imposed, if any and the reasons for the restrictions....” This Court upheld this legislative determination in *Anderson*, 103 Wn.2d at 907, and further ruled in *Coburn* that no additional health care discovery privilege exists at common law. 101 Wn.2d at 279. Consequently, the discovery privileges in RCW 4.24.250 and RCW 70.41.200(3), which otherwise apply to a hospital committee’s review of hospital services and

periodic reviews of staff credentials, privileges and competence, *see* RCW 70.41.200(1)(a), (b) and (c), do not apply to a hospital's credentialing and privileging records, which are original source documents, *see Coburn* and *Lowy, supra*, or in cases where a hospital has terminated or restricted a physician's medical staff privileges. *See* RCW 4.24.250(1), RCW 70.41.200(3)(d) and *Anderson, supra*.

SWMC concedes that under *Anderson*, RCW 4.24.250(1) does not shield from discovery information related to its termination or restriction of Dr. Moynihan's staff privileges. But it nevertheless argues, without any supporting authority, that this evidence is not discoverable under RCW 70.41.200(3)(d), which specifically allows for discovery of "the fact that staff privileges were terminated or restricted, the specific restrictions imposed if any, and the reasons for the restrictions." SWMC claims RCW 70.41.200(3)(d) only allows for discovery of a hospital's "information", not a hospital's "records", and that its language providing for disclosure of "the specific restrictions imposed... and the reasons for the restrictions" should not be followed. *Joint Brief at 19-21*. These legally unsupported arguments should not be adopted because they conflict with the language of RCW 70.41.200(3)(d), the rules of civil discovery and statutory construction, and

the case law that health care discovery privileges are purely statutory and must be strictly construed in favor of discovery.

The privileges in RCW 4.24.250(1) and RCW 70.41.200(3) cover both “information and documents.”<sup>1</sup> Nothing in RCW 70.41.200(3)(d) says it only applies to “information”, not to “documents”, or that hospital records evidencing “the fact that staff privileges were terminated or restricted, the specific restrictions imposed if any, and the reasons for the restrictions” remain privileged. SWMC’s proposed construction of the privilege exception in RCW 70.41.200(3)(d) is contrary to CR 26(b)(1), which allows discovery of “any matter, not privileged, which is relevant to the subject matter involved in the pending action...including...any books, documents, or other tangible things...”; contrary to CR 34(a) (1), which requires parties “to produce...any designated documents... within the scope of rule 26(b)....”; and contrary to *Coburn*, which holds there are no extra-statutory health care discovery privileges. 101 Wn.2d at 279. Certainly, “the fact that staff privileges were terminated or restricted, the specific restrictions imposed if

---

<sup>1</sup>RCW 4.24.250(1) covers “proceedings, reports, and written records of such [“peer review”] committees” and the good faith sharing of “any information or documents with one or more other [quality improvement] committees, boards, or programs....” RCW 70.41.200(3) covers “information or documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee....”

any, and the reasons for the restrictions” is as readily and as accurately determinable from a hospital’s documents as from interrogatory answers.

SWMC’s proposed construction of RCW 70.41.200(3)(d) would read CR 34 out of the civil rules so long as a hospital disclosed in its CR 33 interrogatory answers “the fact that” it terminated or restricted a physician’s staff delivery privileges. It also would read a hospital’s duty to disclose “the specific restrictions imposed... and the reasons for the restrictions” out of RCW 70.41.200(3)(d), contrary to the fundamental rule of statutory construction that “[a] statute must be read as a whole giving effect to all of the language used.” *State v. Young*, 125 Wn.2d 688, 696, 888 P.2d 142 (1995), *citing Alderwood Water Dist. v. Pope & Talbot, Inc.*, 62 Wn.2d 319, 321, 382 P.2d (1963).

A comparison of the language in RCW 70.41.200(3)(c) and (d) confirms that both of these privilege exceptions apply to documents as well as to information. Subsection (c) allows for “introduction into evidence information collected and maintained by quality improvement committees” in a civil action by a health care provider regarding the restriction or revocation of that individual’s clinical or staff privileges. Subsection (d) allows for discovery in a civil malpractice action of “the fact that staff privileges were terminated or restricted, including the specific restrictions

imposed, if any and the reasons for the restrictions....” Although subsection (c) only refers to “information”, not to “documents”, it is clear from the context that a health care provider is entitled to discover documents “collected and maintained by quality improvement committees” in an action challenging the restriction or revocation of hospital privileges. Similarly, subsection (d) does not preclude discovery of hospital review committee documents about “the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions....” in a civil malpractice lawsuit.

Statutes creating health care discovery privileges are “contrary to the general policy favoring discovery”, they must be “strictly construed [in favor of discovery] and limited to [their] purposes”, and “the burden of proving the statute’s applicability rests with the party seeking its application.” *Adcox v. Children’s Orthopedic Hosp.*, 123 Wn.2d 15, 31, 864 P.2d 921 (1991) *citing Coburn*, 101 Wn.2d at 276, and *Anderson*, 103 Wn.2d at 905. Since SWMC offers no authority or evidence that the Legislature intended to limit the privilege exceptions in RCW 70.41.200(3) to “information”, it has not met its burden of proving its theory that “the legislature kept the privilege intact as to any and all related *documents*.” *Joint Brief at 21*.

Since SWMC's information and documents relating to its termination or restriction of Dr. Moynihan's hospital privileges are non-privileged and relevant under RCW 4.24.250(1), RCW 70.41.200(3)(d) and *Anderson*, plaintiff is not required to prove additionally that his claims "arise out of" SWMC's actions. Nevertheless, contrary to SWMC's contention, *Joint Brief at 22-23*, Gallinat's corporate negligence claims against SWMC clearly do "arise out of" its privileging action of not terminating Dr. Moynihan's operative vaginal delivery privileges after OB Case 1, where Dr. Moynihan abandoned a previous patient in fetal distress, left the hospital, refused to return when summoned, and failed to arrange for substitute obstetrical coverage. CP 91-92; CP 96-97. SWMC's failure to timely address Dr. Moynihan's actions in OB Case 1 is not a subsequent remedial measure under ER 407, but instead will be admissible at trial on its advance notice of his unfitness or unwillingness to perform vacuum extraction deliveries.

**C. If Petitioner Prevails On His Discovery Claims, The Trial Court Should Be Directed To Assess CR 37(b)(2) Sanctions Against SWMC.**

SWMC admits it "took...action... to restrict or terminate Dr. Moynihan's hospital privileges." *Joint Brief at 22*. Contrary to SWMC's misstatement at p. 26 of its *Joint Brief*, Gallinat made specific discovery requests for "All documents, memoranda, correspondence, reports or any

other records relating to *any* changes, limitations, restrictions or revocation of [Drs. Moynihan's, Ahearn's and Hutchinson's hospital] privileges....". CP 158, 140, 222, 241. The trial court's May 4, 2010 order required SWMC to produce *all* information and documents covered by RCW 70.41.200(3)(d) that related to its termination or restriction of Dr. Moynihan's hospital privileges: "The plaintiff's motion to compel discovery of credentialing and privileging files is denied, except to the extent that the *information or materials* fall within the exceptions to the privilege described in RCW 70.41.200(3) and RCW 70.41.230(5)."<sup>2</sup> CP 284-85 (Emphasis supplied).

When SWMC did not comply with the May 4 order, plaintiff moved for *in camera* review of the hospital's credentialing and privileging files. CP 309-12. At the June 21, 2010 hearing on the *in camera* review motion, the trial court again ruled that "if the [information and materials] are covered by those exceptions, then they're supposed to be disclosed", and it asked if SWMC had produced any responsive information or documents. 6/21 RP 19. SWMC's lawyer responded that "I've reviewed the findings myself", 6/21 RP 20, then said that SWMC had not produced any information or materials in response to the May 4 order because he did not take Dr. Moynihan's file

---

<sup>2</sup>SWMC did not contend in the trial court that the privilege exception in RCW 70.41.200(3)(d) only applies to information, not documents, and did not seek appellate review of the trial court's ruling that it applies to both.

home with him over the weekend, but instead only reviewed Dr. Hutchinson's credentialing file, which obviously would not contain any information or documents about the termination or restriction of Dr. Moynihan's hospital privileges:

I didn't look at Dr. Moynihan's file over the weekend. So I can't speak just specifically to that one. I reviewed Dr. Hutchinson's over the weekend so I – I don't want to misrepresent anything, of course, to the court.

6/21 RP 19.

At the June 21, 2010 hearing, the trial court ordered that "SWMC's counsel will file within two weeks a certification that the files were reviewed and that any documents under the exceptions in RCW 70.41.200(3) and [RCW 70.41.230](5) were produced or do not exist." CP 417-18. (Emphasis supplied). When SWMC also did not comply with the June 21 order, plaintiff moved to enforce the May 4 and June 21 orders, again specifically seeking the RCW 70.41.200(3)(d) information and documents. CP 508-22. At the August 17, 2010 hearing on the motion to enforce, SWMC's lawyer told the trial court "it just didn't click with me" that Gallinat was seeking "files regarding terminating, restricting [Dr. Moynihan's] privileges", 8/17 RP 69, and that she only looked for those documents in Dr. Moynihan's credentialing file, where they do not exist, not in the hospital's investigation file or other file where they do exist. 8/27 RP 63-64. SWMC's lawyer did

not certify in her subsequent July 7 or August 12, 2010 declarations that documents terminating or restricting Dr. Moynihan's hospital privileges "do not exist" as required by the June 21 order. CP 443-44; CP 560-62.

SWMC has never disclosed in its discovery responses any information or documents from its files disclosing "the fact that" *it* terminated or restricted Dr. Moynihan's hospital privileges, let alone the specific restrictions *it* imposed, or *its* reasons for the restrictions. CP 140, 158, 222, 241. SWMC only cites the public record—*i.e.* the DOH's Statement of Allegations and Dr. Moynihan's Stipulation to Informal Disposition, CP 96-100—not its own information or records that it terminated or restricted his hospital privileges. *Joint Brief at 6.*

In *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 584, 220 P.2d 191 (2010), this Court said: "A party's disregard of a court order without reasonable excuse or justification is deemed willful." *quoting from Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002). SWMC's continuing refusal to comply with the May 4 and June 21 discovery orders obviously is without reasonable justification or excuse. One of SWMC's lawyers admitted he had reviewed "findings" terminating or restricting Dr. Moynihan's hospital privileges, but did not produce any related documents as required by the May 4 discovery order

because he chose only to look at Dr. Hutchinson's file—which he knew would not contain the documents—rather than Dr. Moynihan's file. 6/21 RP 20.

SWMC's other lawyer admitted she only looked for the hospital's records terminating or restricting Dr. Moynihan's privileges in his credentialing/privileging file, where they did not exist and intentionally did not look in the hospital's investigation file or other files, offering the ridiculous excuse that "it just didn't click with me" that plaintiff was seeking those documents. 8/17 RP 69. This excuse was plainly contrived. It obviously "did click" with SWMC's lawyer that plaintiff was seeking, and the trial court had twice ordered SWMC to produce, those documents because her July 7, 2010 declaration shows that she had looked for them in Dr. Moynihan's, Dr. Ahearn's and Dr. Hutchinson's credentialing files:

... I received the credentialing files for Dr. Daniel Moynihan, Dr. Kathleen Hutchinson, and Dr. Jane Ahearn from Southwest Washington Medical Center and these files have been reviewed and analyzed. None of the credentialing files contain information or items that fall under the exceptions (allowing disclosure) under RCW 70.41.200(3) and RCW 70.41.230(5). Specifically, none of the files contain information about the restriction or revocation of any of the above physicians' clinical or staff privileges. Further; the credentialing files do not contain any information about the termination of the physicians' staff privileges, nor was there any information about any specific restrictions imposed on any of the physicians.

CP 443-44. SWMC's lawyer wilfully violated the May 4 and June 21 discovery orders, *Magana*, and *Washington State Physicians Ins. Exchange*

*& Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 347, 352, 858 P.2d 1054 (1993) by intentionally not looking for SWMC's records terminating or restricting Dr. Moynihan's hospital privileges in the files where that information is located and by not certifying that those documents "do not exist."

SWMC's willful disobedience of the trial court's May 4 and June 21 discovery orders is further reflected in its supplemental discovery responses, which claim that its documents terminating or restricting Dr. Moynihan's hospital privileges are "NA" [Not Applicable], CP 241, in its refusal to answer or document even "the fact that" it terminated or restricted Dr. Moynihan's hospital privileges, and in its cavalier shell game on appeal of saying it won't look for the documents in its investigation files because "there is no evidence of a separate 'investigation file.'" *Joint Brief at 26, fn. 14.*

The trial court repeatedly ordered SWMC to produce its information and documents evidencing "the fact that [Dr. Moynihan's] staff privileges were terminated or restricted, including the specific restrictions imposed, if any, and the reasons for the restrictions" or to certify that they "do not exist", CP 284-85; 6/21 RP 19-20; CP 417-18, but failed to enforce its orders, later stating that they only pertained to SWMC's credentialing/privileging files, 8/17 RP 76-77, and that they had been followed, 8/17 RP 68; CP 582-84, even though SWMC had not produced any information or a single document

in response to them or certified that the documents do not exist. “A trial court abuses its discretion when its order... relies on unsupported facts or applies the wrong legal standard... [or] is ‘manifestly unreasonable—[i.e. if]‘the court, despite applying the correct legal standard’ to the supported facts, adopts a view ‘that no reasonable person would take.’” *Magana*, 167 Wn.2d at 582-83, *quoting from Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). Under these standards, the trial court abused its discretion by:

(1) relying on unsupported facts when it “accepted SWMC’s counsel’s representation that SWMC had a regularly constituted review committee in 1996 or 1997 when OB Cases 1 and 2 were reviewed... because she had no personal knowledge about whether SWMC had a quality improvement committee in 1996 or 1997”, *see App. A* at 6-7;

(2) applying the wrong legal standard when it delegated to SWMC’s lawyer its judicial authority and responsibility decide if a health care discovery privilege applied when it accepted, without any independent review, the hospital’s lawyer’s “certification” (a) that the hospital’s credentialing and privileging files were privileged, CP 284-85, and (b) that the hospital’s information and documents terminating or restricting Dr.

Moynihan's hospital privileges were not discoverable under RCW 70.41.200(3)(d), *see* CP 443-44; CP 417-19; CP 582-84; 8/17 RP 76-77;<sup>3</sup>

(3) adopting a view that no reasonable person would take when it ruled the hospital had complied with its May 4 and June 21 orders to produce "information or materials [that] fall within the exceptions to the privilege described in RCW 70.41.200(3)..." when SWMC in fact did not produce any of its information or records documenting "the fact that [Dr. Moynihan's] staff privileges were terminated or restricted, the specific restrictions imposed if any, and the reasons for the restrictions" and did not certify that those documents "do not exist", *see* CP 582-84; 8/17/10 RP 76-77;

(4) applying the wrong legal standard when it ruled, contrary to *Magana* and *Fisons*, that SWMC only had to look for information and documents terminating or restricting Dr. Moynihan's privileges in its credentialing files, where it does not exist, and did not have to look in its investigation or other files where it presumably does exist because SWMC has not certified otherwise, *see* CP 443-44; 8/27 RP 19-20, 63-64, 69;

(5) adopting a view that no reasonable person would take and applying the wrong legal standard when it ruled that SWMC's failure to

---

<sup>3</sup>Under the correct legal standard in ER 104, "Preliminary questions concerning ... the existence of a privilege...shall be determined by the court."

comply with its May 4 and June 21 orders “was the result of inadvertence”, rather than willful and inexcusable, *see* 8/17 RP 78, *Magana* and *Fisons*, *supra*; and

(6) applying the wrong legal standard in denying Gallinat’s request for CR 37 attorney fees and expenses based on its ruling that “[b]oth parties prevailed to some extent so each party can pay their own attorney fees as relates to this matter.” CP 581.

Under CR 37(b)(2), the trial court was required to award attorney fees and expenses against SWMC and/or its lawyers for wilfully violating, without substantial justification or reasonable excuse, its May 4 and June 21 orders to produce its RCW 70.41.200(3)(d) information and documents.<sup>4</sup>

### III. CONCLUSION

If SWMC is not required to produce any information or documents regarding its termination or restriction of Dr. Moynihan’s hospital privileges, then RCW 70.41.200(3)(d) and the trial court’s May 4 and June 21, 2010

---

<sup>4</sup>CR 37(b)(2) provides:

**(b) Failure to Comply With Order. ...**

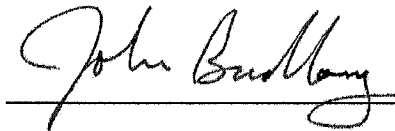
(2)... In lieu of any of the foregoing orders [in CR 37(b)(2) (A)-(E)] or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

discovery orders mean nothing and constitute a failure of law. Petitioner respectfully asks the Court to reverse the decisions of the trial court and to remand with directions to order defendant SWMC to produce its credentialing and privileging records for Jordan Gallinat's treating physicians, including its records of terminating or restricting Dr. Moynihan's hospital privileges, and to direct the trial court on remand to assess CR 37(b)(2) sanctions against SWMC.

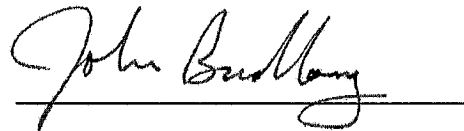
RESPECTFULLY OFFERED this 4<sup>th</sup> day of January, 2012.

THE BUDLONG LAW FIRM

LAWRENCE WOBBROCK TRIAL  
LAWYER, P.C.

A handwritten signature in cursive script, reading "John Budlong", written over a horizontal line.

John Budlong  
WSBA #12594

A handwritten signature in cursive script, reading "John Budlong", written over a horizontal line.

For Lawrence Wobbrock  
WSBA #31412

Attorneys for Petitioner Douglas Fellows/Jordan Gallinat